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COURT OF CRIMINAL APPEALS
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NO. PD-1348-17

IN THE COURT OF CRIMINAL APPEALS
FOR THE STATE OF TEXAS

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COURT OF CRIMINAL APPEALS
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LAURO EDUARDO RUIZ,
Appellant

vs.

THE STATE OF TEXAS,
Appellee

ON APPEAL FROM THE 186th JUDICIAL DISTRICT COURT
OF BEXAR COUNTY, TEXAS
CAUSE NUMBER 2015CR4068

BRIEF FOR THE STATE

NICHOLAS "NICO" LAHOOD
Criminal District Attorney
Bexar County, Texas

LAUREN A. SCOTT
Assistant Criminal District Attorney
Bexar County, Texas
Paul Elizondo Tower
101 W. Nueva Street
San Antonio, Texas 78205
Phone: (210) 335-2885 Email: lscott@bexar.org
State Bar No. 24066843

Attorneys for the State of Texas

IDENTITY OF PARTIES AND COUNSEL

APPELLANT - DEFENDANT	**Lauro Eduardo Ruiz**
TRIAL AND APPELLATE STATE'S ATTORNEY S	**Lauren A. Scott** Assistant Criminal District Attorney Paul Elizondo Tower 101 W. Nueva Street San Antonio, Texas 78205 Phone: (210) 335-2885 Email: lscott@bexar.org State Bar No. 24066843 **S. Patrick Ballantyne** Assistant Criminal District Attorney Bexar County, Texas Email: sballantyne@bexar.org State Bar No. 24053759
TRIAL DEFENSE ATTORNEY	**Shawn C. Brown** 540 S. St. Mary's St. San Antonio, Texas 78205 Phone: 210-224-8200 Email: Shawn@ShawnBrownlaw.com State Bar No. 24003613
APPELLATE DEFENSE ATTORNEY	**Alex J. Scharff** Email: alex@lawofficesofalanbrown.com State Bar No. 17727350
HONORABLE PRESIDING JUDGE	**Honorable Jefferson Moore**
HONORABLE MAGISTRATE JUDGE	**Honorable Andrew W. Caruthers**[1]

[1] Honorable Judge Jefferson Moore referred the motion to suppress to be heard by Judge Caruthers.

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	§	
THE STATE OF TEXAS,	**§**	
APPELLEE	**§**	**CRIMINAL APPEALS**

BRIEF FOR THE STATE

To the Honorable Court of Criminal Appeals:

Now comes, Nicholas "Nico" LaHood, Criminal District Attorney of Bexar County, Texas, and files this response brief for the State.

STATEMENT OF THE CASE

On April 13, 2015, the appellee, Lauro Eduardo Ruiz, was indicted on ten (10) counts of attempted production of sexual performance by a child. (C.R. at 3-6). On December 31, 2015, Ruiz filed a motion to suppress evidence. (C.R. at 7). On March 9, 2016, the court heard evidence in a pre-trial hearing on the motion and on April 7 the court granted the motion to suppress and made oral findings on the record. (C.R. at 35 and 2 R.R. at 24-25). The State filed a memorandum of law opposing the defense motion on March 11, 2016, which the trial court considered. (C.R. at 23 and 1 R.R. at 6). After the court signed the order granting the defense motion the State appealed. (C.R. at 31 and Supp. C.R. at 4). The Fourth Court of Appeals reversed and remanded the trial court's suppression order

on July 26, 2017. *State v. Ruiz*, 535 S.W.3d 590 (Tex. App.—San Antonio 2017). Ruiz petitioned this Court for discretionary review, which was granted on March 28, 2018. Ruiz filed his brief on the merits on May 14, 2018. The State files this brief in response.

STATEMENT OF FACTS

At the motion to suppress hearing, the State did not stipulate to a warrantless search and the burden of proof remained on the defense. (1 R.R. at 5-6). The defense called four witnesses in support of his motion—three school administrators and one police officer. Ruiz did not testify. The State offered the search warrants into evidence and the trial court admitted State's exhibits 9, 10 and 11. (1 R.R. at 128 and 132). Based on the testimony of the witnesses, the State offers this summary:

Two Antonian High School students were worried about seeing their substitute teacher, Lauro Ruiz, call girls to the classroom podium and then use his foot to scoot his computer bag on the floor close to where the girls were standing in their uniform skirts. (1 R.R. at 68-69 and State's exh. Nos. 1 & 2). The girls were worried enough that they took pictures of Ruiz and then sought out a trusted coach who sent them to the Dean of Students, Laura Rodriguez. (1 R.R. at 43-44, 68-70 and State's exh. No. 1 and No. 2). After talking to the girls and seeing the pictures, Ms. Rodriguez called the Principal, Mr. Saenz, and spoke to the Vice

Principal, Mr. Haywood. (1 R.R. at 49 and 71). Mr. Haywood sent a text to Ruiz, asking him to "swing by" his office, which was at the front of the school building. (1 R.R. at 11). When Ruiz arrived, Mr. Haywood was meeting with a student so Ruiz and Ms. Rodriguez waited for him to finish in Mr. Saenz's office. (1 R.R. at 12). Ruiz and Ms. Rodriguez waited for about 10 minutes when Mr. Haywood entered the office. (1 R.R. at 12 and 52). The three of them sat in the office and Ms. Rodriguez asked Ruiz if there was anything Ruiz needed to talk about and whether there was something on his phone. (1 R.R. at 16 and 54). After they asked whether there was anything on Ruiz's phone, Ms. Rodriguez asked if they could see his phone. (1 R.R. 55 and 73). Ruiz became nervous, pulled his phone out of his pocket and began "fidgeting" and "fiddling" with his phone and began scrolling through his phone, showing pictures to Haywood and Rodriguez. (1 R.R. at 16-19, 31, 55, 58, and 73). Once Ruiz began scrolling through his phone, Ms. Rodriguez asked him to put the cell phone on Mr. Saenz's desk. (1 R.R. at 19, 31, 59, and 74). Ruiz complied and voluntarily placed his phone on the principal's desk. (1 R.R. at 74).[2]

At some point in this initial meeting, the principal, Mr. Saenz entered his office and sat at his desk. (1 R.R. 19, 32, 59-60, 75, 89-90, 109-110). Ruiz's cell phone was still sitting on the desk and Mr. Saenz began asking Ruiz questions. (1

[2] Ruiz claims he continued to refuse his phone to the administrators. (Appellant's brief at 11). This claim is not supported by the evidence. Ruiz cites to his affidavit attached to his motion to suppress, but his affidavit was not offered or admitted into evidence and Ruiz did not testify.

R.R. at 19, 32, 60, 76, 92, and 110). After some questioning by Mr. Saenz, Ruiz admitted that he had a "problem" and that he took pictures up the skirts of Antonian students. (1 R.R. at 33, 61, 94 and 111). After Ruiz admitted to taking the recordings of the girls, Mr. Saenz told him that he was suspended from working at the school and that they would have to take his cell phone and turn it over to the police, and Mr. Saenz picked up Ruiz's cell phone from his desk. (1 R.R. at 20-21, 33-34, 61-62 , 96, and 112). Once Mr. Saenz had the phone and indicated to Ruiz that he was turning the phone over to law enforcement, Ruiz made a request to either make a phone call or see his phone to retrieve some contact information. (1 R.R. at 21, 36, 62-63, 77-78, 95-97, 100, and 112). Mr. Saenz picked up Ruiz's phone, pressed a few buttons, scrolled through some images on the phone, and got the phone to the home screen. (1 R.R. at 95-97, 105 and 112). At that point, he let Ruiz go through his contacts and write some numbers down. (1 R.R. at 100, 102, and 112-114). After Ruiz was finished, Mr. Saenz placed the phone in an envelope and Ruiz left the campus. (1 R.R. at 114-115). Mr. Saenz informed Castle Hills Police Department and Sgt. Waggoner arrived on campus, took possession of the phone, and logged it as police evidence. (1 R.R. at 126-127).

Castle Hills Detective Tuner obtained a search warrant for the content of Ruiz's phone, which turned over the ten video recordings up the skirts of Antonian

students which correspond to the ten counts in the indictment. (State's Exh. Nos. 9, 10 and 11).

The trial court made oral findings on the record. The trial court found that the school principal's examining Ruiz's cell phone was a violation requiring evidence exclusion under 38.23(a) because the principal did not obtain a warrant and the school principal's actions did not fall under the warrantless search exceptions of consent to search or exigent circumstances. (2 R.R. at 24-25).

The Fourth Court of Appeals summarized the trial court's findings as such:

- "the information obtained from Ruiz's cell phone was a result of a private citizen seizing [Ruiz's] telephone;"

- "Ruiz may or may not have consented to leaving his cell phone with school authorities;"

- "Ruiz did not consent to [Saenz's search of Ruiz's cell phone];"

- "Saenz . . . conducted a search of the defendant's telephone without obtaining a search warrant;"

- "[Saenz] subsequently gave the information he had obtained from the search of [Ruiz]'s cell phone to law enforcement authorities;"

- "a search warrant was obtained by police officers;" and

- "information was obtained from [Ruiz's] cell phone through the search warrant."

Id. at 592.

SUMMARY OF THE ARGUMENT

Ruiz misinterprets the rule in *Miles*. The *Miles* rule is not a measure to determine whether a private citizen violated the law, but a rule to use once the evidence shows the private citizen did in fact violate the law. The Fourth Court of Appeals properly found that there is no warrant requirement for private citizens and the school administrators did not violate Ruiz's constitutional rights. In addition, the Fourth Court correctly found that Ruiz failed in his burden of proof to show any other statutory violation committed by the school administrators that would have required excluding the State's evidence.

Ultimately, the Antonian school administrators acted in their private capacity, they acted reasonably, and their actions that day should not trigger the Texas exclusionary rule. The State respectfully asks this Court to affirm the Fourth Court's opinion.

ARGUMENT

1. THE FOURTH COURT OF APPEALS PROPERLY ANALYZED THE "OTHER PERSONS" PROVISION OF 38.23(A).

a. The Court of Criminal Appeals did not create a warrant requirement for private citizens under 38.23(a) in *Miles v. State*.

Article 38.23(a) provides for the exclusion of evidence if the evidence was obtained by a violation of a constitutional provision or law. When a defendant challenges the admissibility of evidence on the ground that it was wrongfully

obtained by a private person in a private capacity, the defendant must first establish that the private person obtained the evidence in violation of law before the exclusionary rule triggers. *See Baird v. State*, 398 S.W.3d 220 (Tex. Crim. App. 2013). Ruiz asserts a Fourth Amendment constitutional violation because he contends, like law enforcement, the school administrators were required to get a warrant. But the school administrators did not violate the Fourth Amendment and they did not violate Ruiz's constitutional rights. While private citizens may engage in statutorily illegal or annoying behavior if they invade another person's privacy, they cannot violate the Fourth Amendment. Ruiz may not like that the principal picked up his phone, but the principal's actions did not violate the Constitution.

The school administrators can not violate the Fourth Amendment because the United States Supreme Court and this Court have consistently held that the Fourth Amendment governs the actions of the Government not private parties. *See*, *e.g.*, U*nited States v. Jacobsen,* 466 U.S. 109, 114 (1984) (finding state action is required before the Fourth Amendment is implicated); *State v. Rodriguez*, 521 S.W.3d 1, 11–12 (Tex. Crim. App. 2017) (surveying private-party-search doctrine cases). In order to show constitutional protections apply to the actions of private citizens, the appellant would have to show that the private party was acting in the role of a police agent. *Chaires v. State,* 480 S.W.2d 196 (Tex. Crim. App. 1972). The school administrators were not acting under the guidance or control of any

police agency in this case, but were clearly acting in their private school employment capacity.

Ruiz claims that *Miles* should control this Court's decision, but the case that controls is *Cobb v. State.* In *Cobb v. State*, this Court found a private citizen's conduct "does not implicate constitutional restraints." *Cobb v. State*, 85 S.W.3d 258, 270–71 (Tex. Crim. App. 2002)[3]. In *Cobb*, the analysis was not whether an officer could have done what the private citizen did or whether the private citizen should have had a search warrant. The analysis was whether there was evidence to show that the private citizen had committed a crime—specifically theft. *Id.* at 270–71. Even though the private citizen took property from appellant's home without consent, the Court found there was no evidence the private citizen committed a crime because the private citizen took the property with the intent of turning over potential evidence to the police. *Id.* .This case should be analyzed the same way that the Court analyzed *Cobb*. The question here is whether the school administrators violated the law.

A recent instructive case from this court is *Baird v. State*. In *Baird*, the Court looked at whether a dog sitter violated a trespass and breach of computer security law when she went into the homeowner's bedroom and searched his computer. *Baird*, 398 S.W.3d at 228. There was no mention of a warrant requirement and the

[3] Judge Cochran authored the majority opinion in *Cobb v. State*. Judge Cochran also authored the majority opinion in *Miles v. State*. Even though *Miles* came out five years after *Cobb*, it did not overrule *Cobb*.

Court did not use *Miles* to analyze the conduct of the dog sitter.[4] Instead, the Court found the dog sitter did not illegally trespass because she had apparent consent to be in the master bedroom and search the computer because of the allowances made by the owner for the dog sitter to make herself at home. *Id.* at 230.

Based on Ruiz's argument, he believes this Court should have analyzed the actions of the dog sitter by asking if a police officer could have done what the sitter did. Ruiz bases his argument on *Miles v. State*. (Appellant's brief at 17). But Ruiz misunderstands what the *Miles* rule proscribes. The *Miles* analysis is used to determine whether evidence should be suppressed under 38.23(a)—after the evidence shows the private citizen violated the law. Once the Court has determined that a private citizen has violated the law, then the Court can use the *Miles* rule to determine whether the private citizen violated the law in a manner which requires evidence suppression. The *Miles* rule is not used to determine whether the private party violated the law in the first place. *See Miles v. State*, 241 S.W.3d 28, 44 (Tex. Crim. App. 2007) (stating, [t]he issue is whether an officer or private citizen . . . may violate certain laws in order to follow or stop that suspect" and addressing whether 38.23 "bars evidence obtained by an "other person" if that person violates traffic "laws of the State of Texas" . . .).

[4] In addition, the Court noted that they were analyzing the Texas statutory meaning of "apparent consent" which "obviously differs" from the meaning of consent for Fourth Amendment purposes. *Id.* at 229 and n. 44.

Following Ruiz's logic means that under the circumstances of the *Baird* case, law enforcement could have gone in the homeowner's bedroom and searched the computer. It seems unlikely, however, that a court would rule that general consent for law enforcement to enter a home, gives law enforcement consent to enter a bedroom and search the computer. More likely the finding would be that law enforcement under the facts of Baird would not have been able to search the computer. *See State v. Weaver*, 349 S.W.3d 521, 526 (Tex. Crim. App. 2011) (noting, "The scope of a search is usually defined by its expressed object."). This analysis of *Baird* illustrates that the Court does not use *Miles*' "a private person can do what a police officer standing in his shoes can legitimately do" to determine whether the private citizen violated the law in the first place.

Rodriguez v. State also illustrates that there are things a private party can do that law enforcement cannot do. *Rodriguez*, 521 S.W.3d at 11 (asking, "how free are the police to do what was done earlier by a private party?"). In *Rodriguez*, the appellant's dorm room was first searched by dorm personnel who found drugs. The dorm personnel then called and brought the police to the dorm room to show law enforcement the drugs they found. In the end the Court held that even though the housing agreement allowed the RA's to enter the dorm room, this did not extend to law enforcement and appellant maintained an expectation of privacy in

her room. *Id.* at 15. Clearly the Court measures a private citizen's conduct differently than that of law enforcement or agents of law enforcement.

Another example illustrating that private citizen's actions are not governed by Fourth Amendment constitutional protections is when a private citizen draws blood in an alcohol related case. Police officers must get a warrant before they have the blood drawn of someone who is under arrest for an alcohol or drug related crime. *See State v. Villarrel*, 475 S.W.3d 784 (Tex. Crim. App. 2015). But if that same individual is taken to the hospital to be treated, then hospital staff may draw medical blood without first getting a warrant—even if the hospital staff knows the individual is under arrest. *Mayfield v. State*, 124 S.W.3d 377, 378 (Tex. App.—Dallas 2003). Again, this is because the Fourth Amendment protections govern the actions of the government against a citizen. They do not govern the actions of one citizen against another citizen.

The only case, and one on which Ruiz relies, that states a warrant requirement applies to the actions of a private person was an Austin Court of Appeals case. *Pitonyak v. State*, 253 S.W.3d 834, 850 (Tex. App.—Austin 2008). This dictum from the Austin Court incorrectly stated the rule in *Miles*. The Austin Court of Appeals wrongly inferred the Court of Criminal Appeals to have "effectively applied[d]" a warrant requirement on private citizens. *Id.* . But that is not the holding in *Miles*. As stated, the rule in *Miles* is once it is shown that there is a

violation of the law by a private a citizen, then the exclusionary rule does not apply if the private citizen's actions mirrored proper police action; and, the exclusionary rule will apply if the police could not have done what the private citizen did. *Miles*, 241 S.W.3d at 38–39. The *Miles* Court did not put a warrant requirement on the actions of a private citizen; instead, the Court gave a rule to use in analyzing the actions of a private citizen once it is shown that they have in fact violated the law.

The important distinction in *Miles* and *Pitonyak* is that the private citizens in both of those cases clearly violated the law. In *Miles* there was no question that the tow truck driver violated traffic laws by driving the wrong way on a one way street. *Id.* at 30. In *Pitonyak*, there was no question that the concerned friend of the victim violated the law by breaking into the appellant's home. *Pitonyak*, 253 S.W.3d at 839 and 851. What these two cases establish is that once it is shown that a private citizen has violated a law, then the actions of that private citizen are evaluated under the same reasonableness standard that applies to law enforcement. Neither case created a warrant requirement for private citizens.

No 38.23(a) "other persons" case has excluded evidence because a private individual failed to get a warrant. The only two Court of Criminal Appeals cases that found evidence should be excluded were cases where the private citizens were found to have burglarized a funeral home and truck. *See, e.g.,* S*tate v. Johnson*, 939 S.W.2d 586 (Tex. Crim. App. 1996) (holding seized evidence inadmissible

under Article 38.23 after "other persons" burglarized a funeral home); *Jenschke v. State*, 147 S.W.3d 398, 403 (Tex. Crim. App. 2004) (holding "other persons" acted illegally when they broke into the defendant's truck and took a condom from the truck without the intent to immediately turn it over to police). The Court did not make its finding excluding evidence based on constitutional violations, but instead excluded the evidence based on the statutory violations of burglary. The Fourth Amendment protects citizens from governmental violations of the right to be free from unreasonable searches and seizures. The laws of Texas protect citizens to be free from privacy violations from other citizens. Laws such as theft, assault, or trespass are used to govern private citizens' actions.

In the end, when deciding whether evidence should be excluded under the "other persons" provision, the Court can use Fourth Amendment principles to analyze the reasonableness of another person's actions. But Texas' statutory exclusionary rule covering the actions of "other persons" does not create a requirement for private citizens to get a warrant, and the Fourth Court's opinion reversing and remanding the trial court's order should be affirmed.

b. There is no conflict between jurisdictions on "other person" issues under 38.23(a) and the Fourth Court of Appeals properly analyzed 38.23(a) "other person" issues in previous cases.

Ruiz claims that the Fourth Court's analysis in Ruiz is both inconsistent with the court's own precedent and inconsistent with other jurisdictions. (Appellant's brief at 22-23). This claim is without merit.

Ruiz points to the Fourth Court's opinion in *Melendez v. State*, 467 S.W.3d 586 (Tex. App.—San Antonio 2015, no pet.). He argues the *Melendez* opinion is inconsistent with the court's *Ruiz* opinion because the Fourth Court used Fourth Amendment jurisprudence in its analysis. (Appellant's brief at 22). The important factual distinction between *Melendez* and *Ruiz* is *Melendez* involved a citizen's arrest which is allowed under the Texas Code of Criminal Procedure article 14.01(a). *Id.* at 591. The question before the court in *Melendez* was not whether a private citizen violated a Texas law, but whether there was an actual arrest by the security guard. The court analyzed the facts for the existence of reasonable suspicion and found that the security guard was justified in detaining Melendez until the police arrived. *Id.* at 592–94. Since Texas law allows for citizen arrests, the court properly use Fourth Amendment jurisprudence to analyze whether the citizen arrest was proper. The *Melendez* opinion was based on different facts and is not inconsistent with the Fourth Court's *Ruiz* opinion.

Ruiz points a Thirteenth Court opinion and a Fourteenth Court opinion as examples of the "rift" the Fourth Court's opinion created. (Appellant's brief at 23). But the *Mancia* and *Denkowski* cases are like *Melendez* and are cases that

analyze a citizen arrest under article 14.01. *Mancia*, 2017 Tex. App. LEXIS 7949, at *2 (2017) (unpublished); *Denkowski v. State*, No. 14-16-00273-CR, 2017 Tex. App. LEXIS 7815, at *8 (Tex. App.—Houston [14th Dist.] Aug. 17, 2017, no pet.) (unpublished). Like *Melendez*, these opinions analyze a different factual situation—whether there was a proper citizen arrest. In *Denkowski*, the court assumed there was a citizen arrest and determined whether there was probable cause to support the arrest. *Id.* (unpublished).

In addition, the Fourth Court's *Ruiz* opinion did not create "a rift" with other jurisdictions because there is a published Fourteenth Court opinion directly on point and consistent with the Fourth Court's *Ruiz* opinion. *Thomas v. State*, No. 14-16-00665-CR, 2017 Tex. App. LEXIS 9281 (Tex. App.—Houston [14th Dist.] Oct. 3, 2017, pet. ref'd) (published).[5] In *Thomas*, the appellant's girlfriend searched through his iphone and found incriminating photos. *Id.* . The Fourteenth Court noted that constitutional protections against warrantless searches do not apply to the actions of private individuals and limited their inquiry to whether the girlfriend violated the "laws of the State of Texas." *Id.* (citing Tex. Code Crim. Proc. art. 38.23(a)). The court then analyzed whether the girlfriend violated Tex. Penal Code Ann. § 33.02 (West) and held that she did not violate the law because she did not know that she lacked appellant's consent to access his iphone. *Thomas*,

[5] The State could not find the South West Reporter cite for the case even though it is designated as published.

2017 Tex. App. LEXIS 9281, at *11–15). Essentially, the Fourteenth Court found that the evidence did not show that the private citizen, the girlfriend, violated the law. This is the same thing the Fourth Court found in *Ruiz*. They correctly held that Ruiz had the burden of proof and he failed to provide evidence that the school administrators violated the law. *Ruiz*, 535 S.W.3d at 597. Since there are no inconsistencies within the Fourth Court or with other jurisdictions, the Fourth Court's opinion should be affirmed.

2. ARTICLE 38.23(A) DOES NOT APPLY BECAUSE THE ADMINISTRATORS DID NOT VIOLATE ANY TEXAS LAW.

At the hearing on the motion to suppress, Ruiz only alleged that there was a Fourth Amendment violation because the school administrators were required to get a warrant. Therefore, Ruiz has waived any other argument in support of his position. However, on review this Court is allowed to uphold a trial court's decision based on any correct legal theory. *See Gallups v. State*, 151 S.W.3d 196, 200 (Tex. Crim. App. 2004); *Armendariz v. State*, 123 S.W.3d 401, 404 (Tex. Crim. App. 2003). Based on this, the State will address other potential statutory violations.

While a private citizen cannot violate the Fourth Amendment, a trial court can apply the exclusionary rule to the actions of a private citizen. Under Article 38.23(a), a court can suppress evidence obtained by a private citizen if the evidence was obtained in violation of a Texas law. The legislature codified this

arguably outdated law during the "widespread problem of vigilante-type private citizens [acting] in concert with the police conduction illegal searches for whiskey." *Johnson*, 939 S.W.2d at 591 (McCormick, P.J., dissenting) (citation omitted). Even though prohibition is over and there is not a widespread problem with vigilante-type justice, defendants still assert the exclusionary rule under article 38.23(a) when they believe another person, other than law enforcement, obtained evidence in violation of a Texas law.

Ruiz now argues there was a violation of Tex. Penal Code Ann. § 33.02. Even though the trial court did not analyze this issue, Appellant argues this Court should presume that there was a violation of Section 33.02. (Appellant's brief at 28). However, there is a statutory defense built into Penal Code Section 33.02. This statutory defense renders this section inapplicable in this case, which could explain why this issue was not brought up to the trial court. Section 33.02(e) states, "[i]t is a defense to prosecution under this section that the person acted with the intent to facilitate a lawful seizure or search of, or lawful access to, a computer, computer network, or computer system for a legitimate law enforcement purpose."

The majority opinion in *Ruiz* correctly noted the long history of Texas jurisprudence holding a private citizen does not violate trespass or theft statutes when the citizen takes private property for the purpose of turning evidence over to law enforcement. *Ruiz*, 535 S.W.3d at 596. Not only is this long-held legal

precedent, but Section 33.02 explicitly protects citizens' actions done with the intent to serve a legitimate law enforcement purpose. The trial court did not find, and the record does not support, a violation of Section 33.02 because the undisputed evidence showed that the school administrator's intent was to turn the cell phone over to law enforcement—and that is exactly what he did. (R.R. at 115-116 and 126-127 and State's Exh. Nos. 9-11); *see also id.* at 597.

It is undisputed that the administrators took Ruiz's phone. This could be seen as the administrators stealing his phone. A person commits the offense of theft if he unlawfully appropriates property with the intent to deprive the owner of the property. Tex. Penal Code Ann. § 31.03 (West). The Antonian administrators did not have the intent to deprive the defendant of his phone. At first, they were simply trying to figure out what was going on and look into the allegations made by two students. Once the defendant admitted to "having a problem," the administrators' intent in keeping the phone was to turn it over to the police. The administrators never had the requisite intent to deprive the defendant of his property. This Court found similarly in *Stone v. State*, 574 S.W.2d 85, 88–89 (Tex. Crim. App. [Panel Op.] 1978). In *Stone*, the Court found that the babysitter did not commit theft when she took the photographs from her employer's home because she had no "intent to deprive" the owner of his property, and she committed no illegal act in seizing the photographs and turning them over to the police. *Id.* . .

On the other hand, in *Jenschke v. State*, this Court found evidence obtained by a layperson should be suppressed under Article 38.23(a) because the actions of the other person violated the Texas law of burglary of a vehicle because they did not have the intent to turn the appellant's property to law enforcement. *Jenschke*, 147 S.W.3d at 403. Instead the layperson held the property for over two years before turning it over to law enforcement. *Id.* (holding "other persons" acted illegally when they broke into the defendant's truck and took a condom from the truck without the intent to immediately turn it over to police) . In the instant case, the school administrators turned the defendant's phone over to police the same day they found out there was evidence of a crime on the phone. Clearly, the administrators had no criminal intent, but were only trying to protect their students and preserve evidence for police action.

There was also some insinuation at the pre-trial hearing that the school administrators would not let Ruiz leave until he turned over the phone. There was no proof and the administrators denied making any threats toward Ruiz. A person commits an offense if he intentionally or knowingly restrains another person. "Restrain" means to restrict a person's movements without consent, so as to interfere substantially with the person's liberty, by moving the person from one place to another or by confining the person. Restraint is "without consent" if it is accomplished by force, intimidation, or deception. Tex. Penal Code Ann. § 20.02

(West). In this case, the administrators did not use force, intimidation, or deception. They were simply doing their jobs and investigating an allegation against a teacher that affected the safety and well-being of the students the defendant encountered.

In the end, Ruiz has waived any argument for excluding the evidence based on a violation of Texas Statute. Moreover, the Fourth Court's opinion should stand because Ruiz did not meet his burden of proof and provide sufficient evidence that the school administrators violated the law.

3. THERE WAS NO VIOLATION BECAUSE THE PRINCIPAL BELIEVED HE HAD RUIZ'S CONSENT TO PICK UP AND HANDLE THE CELL PHONE.

The trial court found in addition to the administrator violating Ruiz's Fourth Amendment rights that Ruiz did not give his consent to the administrators to search his cell phone. (2 R.R. at 24). Assuming, without conceding, that there was statutory or constitutional violation that could be overcome by Ruiz's consent, the record and the laws regarding consent do not support the trial court's finding. At the pre-trial hearing, defense counsel focused on whether Ruiz gave Mr. Saenz "permission" to pick up and look at his phone. (1 R.R. at 95-96 and 103). Defense counsel pressed the witness on whether he had explicit permission. *Id.* Mr. Saenz acknowledged that Ruiz did not use specific words, but that he thought he had permission to go through the phone as he was allowing Ruiz to get the contact

information off the phone. (1 R.R. at 96 and 100). While the defense argued for specific words and the witness admitted there were no the specific words such as, "here is my cell phone for you to search," the law does not require specific or magic words of consent.

For example, the Court in *Baird*, looking at apparent consent through a statutory analysis, found that the homeowner using the words "help yourself to anything and everything" while giving the sitter a tour of the entire house gave the dog sitter apparent consent to go in his bedroom and search his computer. *Baird*, 398 S.W.3d at 230. The Court also noted that the house owner did not "expressly banish her from the bedroom, nor did he forbid her to use the computer." *See Id.* While Ruiz may have never said, "here's my phone; do what you want." He did voluntarily place the phone on Mr. Saenz desk and never moved to put the phone back in his pocket. (2 R.R. 19, 31, 59, 74, and 95). In addition, after Ruiz looked through the phone for contact information, he gave the phone back to Mr. Saenz. (2 R.R. at 105). Ruiz never told Mr. Saenz to put his phone down or demand that he not go through his phone. (2 R.R. at 113). In addition, Mr. Saenz's ability to scroll through Ruiz's phone could have only been possible if the phone was either not password protected or Ruiz gave Mr. Saenz the password. The acquiescence by Ruiz gave Mr. Saenz apparent consent to pick up and handle Ruiz's cell phone. The *Baird* Court found that apparent consent is not the type of consent that is

expressly communicated or explicitly verbalized, but it is the type of consent that manifests a clear understanding. *Id.* at 229. Mr. Saenz understood he had Ruiz's cooperation and consent that afternoon based on Ruiz's actions of placing the phone on his desk and then making no effort to stop Mr. Saenz going through his phone after Ruiz indicated he needed contact information from the phone.

Even if the Court looked at consent through the Fourth Amendment analysis, there is still no requirement for any magic or specific words of consent. *Meekins v. State*, 340 S.W.3d 454, 459 (Tex. Crim. App. 2011) (stating, "A person's consent to search can be communicated to law enforcement in a variety of ways, including by words, action, or circumstantial evidence showing implied consent."). For example, in *Gallups v. State*, the Court of Criminal Appeals found that the defendant using a hand gesture of extending his hand out and coming back in was consent for the police to enter his home. *Gallups*, 151 S.W.3d at 201. In this case, Ruiz placed his phone on Mr. Saenz's desk, never picking it back up and never asking for it. When Mr. Saenz picked up the cell phone, looked through the phone, and returned it to the home screen, Ruiz never told Mr. Saenz to stop or demanded his phone back. Ruiz at the very least acquiesced to Mr. Saenz handling his phone, which can be proper consent for another person to rely on. *See State v. Kelly*, 204 S.W.3d 808, 821 (Tex. Crim. App. 2006) (deciding that a "mere acquiescence" to a blood draw provided a finding of consent). The trial court did not properly apply

the law of consent in this case and his finding that there was no consent should be overruled.

4. RUIZ FAILED TO PROVE A CAUSAL CONNECTION BETWEEN THE ADMINISTRATORS' ACTIONS AND THE OBTAINING OF THE VIDEOS AND ARTICLE 38.23(B) SHOULD APPLY.

Even if the Court assumed there was a violation, Ruiz failed to carry his burden and prove there was a causal connection between the administrator's actions and the obtaining of the video recordings. Under Texas case law, the defendant as the moving party to exclude evidence has the burden of proving there is a causal connection between the violation and the obtaining of the evidence. *See, e.g.,* P*ham v. State,* 175 S.W.3d 767, 774 (Tex. Crim. App. 2005); *Wilson v. State,* 277 S.W.3d 446, 448 (Tex. App.—San Antonio 2008) (affrm'd, *Wilson v. State,* 311 S.W.3d 452 (Tex. Crim. App. 2010). In addition, proving the causal connection between the violation and obtaining the evidence is especially important in light of Article 38.23(b). Article 38.23(b) provides an exception to the exclusionary rule when there is a valid warrant and an officer acting in good faith reliance on that warrant. See *McClintock v. State*, 541 S.W.3d 63, 72-73 (Tex. Crim. App. 2017).[6] Ruiz failed to show that Det. Turner knew or should have known that the school administrators violated the law.

[6] *McClintock* came out after the parties had submitted briefs to the Fourth Court of Appeals.

Assuming the administrator's actions of scrolling through Ruiz's phone was improper; Ruiz failed to show a causal connection between this action and the police ultimately obtaining the video recordings off of his phone. Ruiz admitted to taking videos of the female students under their skirts. This admission alone was enough for police to obtain a search warrant and search the contents of Ruiz's phone for the videos. Looking at the probable cause affidavit, there was minimal mention of the administrator scrolling through Ruiz's phone—one line in the probable cause affidavit. (State's exh. No. 9 at page 3, list #20). If this line was removed, then the police would still have probable cause, a valid affidavit and search warrant. The assumed violation played little to no part in the police obtaining the evidence. Ruiz failed to show that the violation had a causal connection to the evidence obtained and he failed to show that officer knew or should have known that the school administrators' conduct was illegal. There was a facially valid warrant in this case; therefore, Article 38.23(b) should apply and the evidence should not be excluded.

5. THE EVIDENCE SHOULD NOT BE SUPPRESSED BECAUSE THE COSTS OF EXCLUSION GREATLY OUTWEIGH ANY DETERRENCE BENEFIT.

Even if the Court assumes the administrator violated the Fourth Amendment, the evidence should not be suppressed because the extreme remedy of excluding the video recordings in this case is not required under *State v. Powell*. In *Powell*

the Court of Criminal Appeals assumed that police violated the Fourth Amendment when they seized the appellee's safes, but found that the drugs found inside of the safes should not be excluded because the initial unlawful seizure was "wholly unrelated" to subsequent lawful search of the safes. *State v. Powell*, 306 S.W.3d 761, 769-70 (Tex. Crim. App. 2010). In *Davis v. State*, the Supreme Court looked at the purpose of the exclusionary rule and balanced the societal costs of excluding evidence with the deterrence value benefit. The Court stated, "[f]or exclusion to be appropriate, the deterrence benefits of suppression must outweigh its heavy costs." *Davis v. United States*, 564 U.S. 229, 237 (2011). These cases instruct that there are times when evidence should not be excluded even if a constitutional violation has occurred.

This case is a time when the evidence should not be excluded because the costs of excluding the evidence greatly outweigh any deterrence value. It is hard to imagine that suppressing the evidence in this case would have any deterrence value on the actions of future school administrators or other private citizens. It is hard to imagine most people would want to deter the sort of actions the administrators took that day. The administrators had a teacher accused of and admitting to recording up the skirts of 15-year-old students; most parents would not want school administrators to turn a blind eye. For the safety of the children violated by Ruiz and the safety of any children he may try to violate in the future, society should

want the school administrators to secure such evidence and prevent the perpetrator from deleting the evidence. That is what administrators did in this case. Their actions were reasonable under the circumstances and cost of excluding this evidence greatly outweighs any deterrence value. Therefore, the Fourth Court's opinion should be affirmed.

PRAYER

WHEREFORE, PREMISES CONSIDERED, the State of Texas submits that the opinion of the Fourth Court of Appeals should, in all things, be AFFIRMED.

Respectfully submitted,

Nicholas "Nico" LaHood
Criminal District Attorney
Bexar County, Texas

/s/ Lauren A. Scott

Lauren A. Scott
Assistant Criminal District Attorney
Bexar County, Texas
Paul Elizondo Tower
101 W. Nueva Street
San Antonio, Texas 78205
Phone: (210) 335-2885
Email: lscott@bexar.org
State Bar No. 24066843

Attorneys for the State

CERTIFICATE OF COMPLIANCE AND SERVICE

I, Lauren A. Scott, herby certify that the total number of words in appellee's brief is approximately 6500. I also certify that a true and correct copy of the above and forgoing brief was electronically delivered to appellant's attorney of record. I also certify that a copy was electronically delivered the State Prosecuting Attorney's office.

/s/ Lauren A. Scott

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Lauren A. Scott
Assistant Criminal District Attorney